Taylor Lumber and Treating, Inc. *and* International Woodworkers of America, U.S. Cases 36–CA–7123 and 36–CA–7255

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 2, 1995, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, the Respondent filed a brief in support of the judge's decision and an answering brief, and the Union filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's dismissal of the complaint, we find it unnecessary to rely on the judge's apparently erroneous statement, in sec. III,D of his decision, that the Regional Director initially dismissed the Union's bad-faith bargaining charge and that it was the Union's successful appeal of the dismissal that caused a complaint to issue on this charge.

In adopting the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(5) of the Act by failing and refusing to bargain in good faith, Members Fox and Liebman do not rely on his alternative rationale, set forth in the paragraph immediately preceding fn. 25 of his decision, that even were he to credit the General Counsel's witnesses, their testimony would not be decisive in determining whether the Respondent failed to bargain in good faith. Finally, in adopting the judge's rejection of the contention that the Respondent's implementation of its hours-of-work proposal independently violated Sec. 8(a)(5), Members Fox and Liebman rely solely on the judge's finding that this contention was neither set forth in the complaint nor fully and fairly litigated. Member Brame would adopt the judge's findings on both these points.

In finding that the attorney-client privilege as construed in *Patrick Cudahy, Inc*., 288 NLRB 968 (1988), applied to confidential communications between Attorney Kellye Wise and members of the Respondent's management control group, Members Fox and Liebman rely on Wise's testimony to the effect that during the year he served as the Respondent's chief negotiator in the negotiations at issue here, he was also engaged by the Respondent to provide legal services in connection with other employment relations matters, and that he advised the Respondent to hire additional counsel only when he became concerned that, given the "tone of negotiations," an unfair labor practice proceeding might result. (Wise was a witness in this proceeding on negotiation-related matter for which the privilege was not claimed.)

Member Brame would adopt, without qualification, the judge's rationale in finding that the attorney-client privilege applied to confidential communications between Attorney Wise and the Respondent.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Patrick Dunham, Esq., for the General Counsel.
James B. Ruyle, Esq. (Miller, Nash, Wiener, Hager & Carlsen), of Portland, Oregan, for the Respondent.
Don S. Willner, Esq. (Willner & Heiling, P.C.), of Portland, Oregan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I conducted the trial of this unfair labor practice prosecution in sessions held in Salem and Portland, Oregon, on July 19, 20, and 21, 1994. Each party was represented by counsel, and each filed a timely, posttrial brief.

The case emerged from the following events: In April 1993,[1] International Woodworkers of America, U.S. (the Union) and Taylor Lumber and Treating, Inc. (the Respondent) began negotiations for a labor agreement to replace the current one covering the Respondent's sawmill workers, which was due to expire on June 1. They were still far from agreement on major issues at the end of their fifth and last session on June 24. On August 16, faced with the Respondent's recent announcement that the terms of its last offer would be implemented that day, the Union called a strike, and nearly all of the mill's roughly 74 bargaining unit employees joined in. The Respondent did not operate the mill during the strike, and the stalemate continued for several months; but on December 9, after learning that the General Counsel had authorized a bad-faith bargaining complaint, the Union mailed a letter to the Respondent containing an "offer" on behalf of the strikers "to immediately and unconditionally return to work under the contract that was in effect prior to the strike[,] and to resume negotiations." The Respondent received this letter, but declined to reinstate the strikers.

On June 20, 1994, the Regional Director for Region 19, acting in the name of the General Counsel, issued the consolidated complaint against the Respondent that brought us to trial. In compressed form, these are the complaint's central allegations: (1) The Respondent violated Section 8(a)(5) of the National Labor Relations Act[2] by bargaining from April through June in bad faith, i.e., to "avoid" an agreement, and with a "desire to rid itself of the Union."[3] (This is a claim accompanied by subcounts attacking the content of certain of the Respondent's bargaining proposals, and the Respondent's alleged "fail[ure] to

[1] All dates below are in 1993 unless I say otherwise.

[2] Sec. 8(a)(5) makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees." This "obligation to bargain collectively" is given further definition in Sec. 8(d) of the Act, which imposes on bargaining parties a duty, inter alia, "to confer in good faith with respect to . . . the negotiation of an agreement."

[3] Thus, the complaint, in several dovetailing paragraphs, alleges more fully that, "During [bargaining sessions in] the months of April, May, and June, 1993," the Respondent engaged in an "overall" pattern of conduct which showed that "Respondent has 'bargained' with a purpose of avoiding, rather than obtaining, a[n] . . . agreement with the Union[,] and [with] a desire to rid itself of the Union[,] as previously expressed by an agent of the Respondent."

offer any meaningful concessions.")[4] (2) The ensuing strike was "caused" by the Respondent's bad-faith bargaining conduct. (3) The Respondent violated Section 8(a)(3) of the Act[5] when it failed to reinstate the strikers on their December 9 offer to return, which the complaint characterizes as an "unconditional offer to return to their former positions of employment."[6] The Regional Director further announced in the complaint that, "as part of the remedy for [the Section 8(a)(3) violation], the General Counsel seeks [an] order requiring Respondent to reinstate the [strikers] and to make them whole for any losses they may have incurred as a result of Respondent's failure to properly and timely reinstate them."[7]

The complaint was amended in small ways at the trial. In its amended answer, the Respondent admits that the Board's jurisdiction is properly invoked, and I so find.[8] The Respondent, however, denies key allegations in the complaint, and these denials define the central issues to be decided in the case. Thus, the Respondent denies that it bargained in bad faith, and argues instead that its bargaining conduct was intended solely to achieve the lawful goal of getting a contract that would lower labor costs and allow it to operate profitably, and the Respondent thereby puts into issue not just the 8(a)(5) count, but as well the remainder of the complaint, including its characterization of the strikers as "unfair labor practice strikers," and its supposition that, by virtue of this status, those strikers were entitled to immediate reinstatement upon making an unconditional offer to return. Separately, the Respondent denies that the Union's December 9 offer to return the strikers to work was an "unconditional" one, and it thereby challenges another element necessary to the prosecution claim that the Respondent violated a statutory duty to reinstate the strikers. And in the alternative, as an affirmative defense to any duty to reinstate the strikers on or after December 9, the Respondent avers that it was "unable" to reinstate the strikers for "legitimate and substantial business reasons."

I have studied and considered the trial record, the parties' briefs, and the various legal authorities they have invoked. Guided by those authorities, and based on the findings and reasoning below, I judge in the end that the General Counsel has not established by a preponderance of the credible evidence that the Respondent conducted its bargaining with the proscribed intention of frustrating or avoiding agreement, much less that its conduct was calculated to satisfy some overriding "desire to rid itself of the Union."

Separately, I will conclude that the Union's December 9 offer to return the strikers to work, conditioned as it was on the Respondent's putting them to work "under the contract that was in effect prior to the strike," did not in the circumstances trigger any duty on the Respondent's part to reinstate any strikers. Accordingly, I will dismiss the complaint, and I will not reach the Respondent's alternative defense to the 8(a)(3) count, that legitimate business considerations stood in the way of reinstating the strikers on the terms they demanded.

The Union's Motion to Reopen the Record: Denied

In its posttrial brief, the Union states its "belie[f] . . . that proof of Taylor's unfair labor practice is overwhelming on this record." It declares further, however, that, "[i]f, *and only if*, the Administrative Law Judge disagrees, then IWA moves to reopen the record to require the production of the missing [sic] subpoena documents, and the testimony of Kelly[e] Wise on what took place at management's strategy meetings."[9] My judgment that the credible record does not sustain the complaint vitalizes the Union's motion to reopen, which I now address:

The Union's motion invites me to revisit attorney-client privilege issues I dealt with at the trial, in the context of ruling on the Respondent's petition to revoke the General Counsel's trial subpoena to the extent it sought the production of records reflecting the Respondent's development or application of its bargaining strategy. Two categories of strategy records were in contest: (1) Those constituting or reflecting intramanagement strategy communications generally, which the Respondent ar-

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[4] Thus, in an argumentative bill of particulars (many of whose fact claims were contradicted by the undisputed evidence presented at trial), the complaint alleges at par. 10:

> During the [April through June] period described above . . . Respondent engaged in the following conduct:
>
> (a) proposed and insisted upon significant reductions in wages, health an [sic] welfare benefits, and pension and vacation benefits.
>
> (b) proposed and insisted upon elimination of the Union's right to negotiate over hours of work.
>
> (c) proposed and insisted upon the elimination of seniority provisions which had been in successive collective-bargaining agreements.
>
> (d) failed to offer any meaningful concessions in any of the items detailed above until after the last negotiations session. Only then, just before implementing its proposal, Respondent altered its language on vacations and on the Union's request to include grandchildren in the provisions of funeral leave.

[5] Sec. 8(a)(3) in pertinent part makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[6] The complaint further alleges that, by committing these 8(a)(5) and (3) violations, the Respondent has also violated Sec. 8(a)(1) of the Act. Sec. 8(a)(1) more generally outlaws any employer conduct that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 7. . . ." (Sec. 7 declares pertinently that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]")

[7] Although it is uncertain from this announcement *when* the prosecution believed it became "proper and timely" for the Respondent to reinstate the strikers, the General Counsel's current position is that, because the strikers were "unfair labor practice strikers," the Respondent owed a duty to reinstate all strikers immediately after (or at least "within a reasonable time" after) it received the December 9 offer, and that the Respondent's failure to fulfill this duty makes it liable for backpay to all strikers from on or shortly after December 9.

[8] Specifically, the Respondent admits, and I find, as follows: The Union's charge in Case 36–CA–7123 was filed on August 25, 1993, and was served on the Respondent on or about that date. The Union's charge in Case 36–CA–7255 was filed on March 11, 1994, and was served on the Respondent on or about that date. The Respondent is an Oregon corporation, and maintains a sawmill in Sheridan, Oregon. In the year before June 20, 1994, a representative period, the Respondent (a) realized more than $500,000 in gross sales, (b) sold more than $50,000 worth in goods or services to out-of-state customers, or to in-state customers who were themselves directly engaged in interstate commerce, and (c) bought and received more than $50,000 worth in goods and materials from out-of-state sources, or from in-state suppliers who, in turn, got them directly from out-of-state sources.

[9] Union Br., p. 3 fn. 3 (the emphasis is the Union's). The Union's motion is supplemented by arguments set forth in an appendix to its brief, which I have considered.

gued were entirely shielded from discovery by policies suggested in *Berbiglia, Inc*., 237 NLRB 102 (1977), and (2) those sought to be withheld on attorney-client privilege grounds, more specifically, those strategy records constituting or reflecting confidential communications between members of the Respondent's management "control group," and Kellye Wise, an attorney employed by a management consulting business, not a law firm.[10]

Finding no substantial authority for the notion that a bargaining party's strategy records enjoy some special, categorical insulation from discovery in an unfair labor practice prosecution where the party's strategy is a relevant subject, I denied the Respondent's petition to revoke as to records meeting only the category (1) definition.[11] And in conformity with this ruling, the Respondent disclosed a four-page set of typed notes, captioned "1993 Contract Negotiation Strategy."[12] But I granted revocation as to records in category 2, after hearing evidence and extensive argument, and after reviewing a variety of authorities.

In thus partially granting the Respondent's petition to revoke, I judged specifically that the records of confidential communications between Wise and members of the Respondent's management "control group" were shielded by attorney-client privilege, as the Board defined and found that privilege to exist in *Patrick Cudahy, Inc*., 288 NLRB 968 (1988). In this regard I noted the Board's emphasis in *Cudahy* on the

> principle that "a matter committed to a professional legal adviser is, prima facie *so committed for the sake of the legal advice* . . . for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice[,]" [and] . . . the presence of business considerations intertwined with legal advice does not necessarily destroy the privileged nature of communications between attorney and client.[13]

I also noted that the Board's analysis and holding in *Cudahy* seemed to preclude inquiry into or dissection of the "legal-nonlegal" particulars of the attorney's relationship or communications with the employer-client; for the Board held broadly (288 NLRB at 971) that,

> the attorney-client privilege encompasses the advice rendered by Krukowski & Costello to Cudahy in the course of helping it prepare for and conduct negotiations with the Union and in advising as to legal constraints on the operation of the plant should a strike ensue. The privilege covers both the communications which provided that advice and the communications that flowed from client to attorney as a basis for generating the advice. *Upjohn Co. v. U.S*., 449 U.S. [383] at 390 [1981].

Finally, I noted that the Board's admittedly "broad . . . application of the privilege"[14] clearly was influenced by policy considerations unique to the labor relations arena.[15]

Considering all this, I judged that Wise's relationship with the Respondent did not "clearly appear to be lacking in aspects requiring legal advice." Indeed, I found it striking that Wise's counseling and bargaining-representation relationship with the Respondent during the strategy communications in question did not appear to have been significantly different from the type of attorney-client relationship presented in *Cudahy*, and I further found unpersuasive the General Counsel's and the Union's attempts to distinguish this case from *Cudahy* on the basis that there, the lawyer was working for a law firm, and here, the lawyer was not. I likewise rejected as irrelevant to the issue of privilege that Wise was not paying into the Oregon attorneys' professional liability fund, but was instead claiming a "house counsel" exemption from such contributions. Finally, on factual grounds, I rejected the General Counsel's and the Union's alternative argument that any privilege that may have existed was waived when Wise disclosed certain facts (which I judged were not facts about privileged communications) in an affidavit he furnished to the Board's Regional Office during the investigation.

I have reconsidered my trial rulings and judgments on these points,[16] and I adhere to them essentially for the reasons just outlined. And with the same reasoning in mind, I must deny the Union's motion to reopen the record, for the motion necessarily calls for the Respondent to disclose and submit to inquiry about communications that I have judged are shielded by attorney-client privilege.

Findings and Conclusions on the Merits

Much in this case is undisputed, including most of the important facts, many of which I summarized in the statement of the case and now incorporate here by reference. The rest is a matter of detail.

I. UNDISPUTED BACKGROUND

For roughly 40 years before the events that concern us, the Respondent operated a sawmill in Sheridan, Oregon, where it processed logs into lumber of various dimensions, and then

[10] On an undisputed record, I find that Wise was at material times an Oregon-licensed attorney in good standing, but was providing labor relations counseling and representational services to the Respondent in his capacity as a full-time employee-representative of Timber Operators Council, a corporation whose business services to its employer-members include counseling them on labor relations matters and representing them in bargaining with unions.

[11] In so ruling, I expressed doubts not only about the soundness of the policy reasoning advanced by the administrative law judge in *Berbiglia* to justify revoking an employer subpoena for a union's bargaining-strategy records, but about the degree to which the Board itself had genuinely embraced that reasoning, especially in the light of the Board's decision in *Patrick Cudahy*, infra, where the Board could have, but did not, simply rely on *Berbiglia* reasoning to shield any management bargaining strategy records, but instead shielded from discovery only those records involving communications with the employer's attorney, and did so solely on the basis an attorney-client privilege.

[12] These were notes used as talking papers in a March 25 bargaining strategy session in which Wise participated, but the Respondent conceded that such notes, and the communications they implied took place on March 25, were not in this particular instance insulated by attorney-client privilege, because they were shared with–and the March 25 meeting was attended by–an "outsider" (an independent private consultant named Gossard), thus destroying the "confidentiality" element necessary to communications shielded by the privilege.

[13] 288 NLRB at 970, quoting *Wigmore*. The italics are the Board's.

[14] Id. at 971 fn. 12.

[15] Thus, the Board, citing "specific labor law reasons," warned that it would "not readily or broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present." Id. at 971.

[16] I take notice that the General Counsel filed an interim appeal to the Board of my partial granting of the Respondent's petition to revoke, and that the Board, while denying the interim appeal, did so without prejudice to the General Counsel's right to renew its appeal after I issued my decision.

shipped the lumber to dealer-customers.[17] The Respondent has always recognized the Union as the bargaining agent for the employees of the sawmill, excepting only office clerical employees, guards, and statutory supervisors. Historically, the Respondent and the Union had always reached successive labor agreements without a strike. The most recent of those agreements was due to expire on June 1. In the year preceding that expiration, a controversy had arisen between the parties over the Respondent's application of a recently implemented incentive bonus arrangement, and at one time, the Union had threatened to strike. This controversy may not have been fully resolved to the Union's satisfaction when the parties entered their 1993 negotiations, but neither does it appear that it was deemed by either party to be a "live" issue for bargaining by that time.

In times of normal mill operation, the Respondent gets its logs mostly by bidding successfully at periodic auctions of standing timber, which it then cuts and hauls to the mill in log form; however, it also augments its supply with logs bought from other sources, including other mills with log inventories to sell. When it calculates its bids for timber or logs, the Respondent's uses an industry formula that is not itself challenged to determine the "break-even" price it can pay, i.e., the price that, when added to the Respondent's cost of milling those same logs into lumber, will yield a total not greater than the current market price for the lumber.[18] For about a year before the parties began their 1993 bargaining, the Respondent had been getting regularly outbid at timber sales. The Respondent blamed this on its fixed labor costs during a period of escalating timber prices, which left it unable to make a "break-even" bid. But when the Respondent entered bargaining with the Union in the spring of 1993, the timber/log market price had recently dropped,[19] and the Respondent admittedly had enough logs in its yard or awaiting harvesting to keep the mill going until about the end of the year.[20]

From 1985 until early January 1991, Barney Olberg, then titled "President," was in charge of the Respondent's overall operations. Under Olberg were Roland Mueller, the sawmill "plant manager," and Bruce Summers, who was the "head forester," in charge of timber acquisition, harvesting, and transport to the mill's log yard, but with little responsibility for or involvement in sawmill operations or labor relations matters affecting the sawmill. In January 1991, however, the Respondent's owners gave Olberg the choice of signing a prepared letter of resignation or being fired, and Olberg resigned, and was replaced by Summers, who took on the title, "General Manager," and with it, the responsibility for dealing with the Union.[21]

II. DISPUTED BACKGROUND; SUMMERS' ALLEGED ANTIUNION STATEMENTS

To support the prosecution claim that the Respondent conducted bargaining so as to "avoid agreement" and with a "desire to rid itself of the Union," the General Counsel presented three witnesses, former President Olberg, plus William Pelzer and Dennis Derum, two former mill supervisors who were themselves laid off in mid-October 1992, as part of a management belt tightening. Olberg and Pelzer testified commonly (with faint echoes from Derum) that, before they each left the Respondent's employ, Summers made repeated and nearly identical statements to them personally, and/or in management meetings, amounting to vows that Summers would "get rid of [or 'break'] the Union."[22] (Pelzer recalls that Summers would routinely append such statements with the phrase, "if it was the last thing [he] did.") None of these witnesses could recall the timing or any contextual particulars whatsoever of any of these alleged instances.

Summers denied ever having made such statements in any context. He was echoed by Sawmill Manager Mueller, and by Ed Reid, the Respondent's longtime timber buyer, both of whom testified that they had never heard Summers say any such thing, even though both of them were said by Pelzer to have been present in management meetings where Summers supposedly made many such statements. The Respondent called two other witnesses[23] to affirm that they, too, had never heard Summers make any such statements, and each of them would appear to have had much opportunity to have heard Summers make them, if, indeed, he had been as disposed as Pelzer and Olberg say he was to make them.

When an employer's "real" bargaining intentions are called into question in a prosecution like this one, evidence of the employer's antiunion disposition based on away-from-bargaining-table statements or behavior is certainly relevant to an assessment of those intentions. But such evidence—or the lack thereof—is only one of many factors that may feed into the

[17] The Respondent has also operated a separate, "pole-treating plant," which does not figure in this case.

[18] The Respondent is not in the business of simply trying to "break even." Rather, I infer from the explanations given by the Respondent's witnesses (specifically, General Manager Summers and Chief Financial Officer Doss) that the "break-even" calculation is merely part of a larger business calculation, which itself is driven by the expectation that log market prices—and milled lumber market prices in turn—will steadily rise over time and, therefore, that profit can be derived from selling lumber in a future market that was produced from logs bought earlier.

[19] Both Summers and Doss testified in substance that the timber and log market prices had recently dropped largely because many private timberlot owners were now anxious to get their assets to market, at lower price if need be, out of fear that the Government, for environmental (e.g., "Spotted Owl") reasons, might soon impose private-land logging bans or restrictions.

[20] Indeed, the Respondent's counsel invited Summers and Doss to assert these facts to support their overall claim that the Respondent entered into 1993 bargaining with the Union with a wish to continue to operate, a claim that itself is advanced to contradict the prosecution claim that the Respondent intended from the outset of bargaining never to reach agreement, but instead, to provoke a strike that would end in the "rid[ding] itself of the Union."

[21] Mueller remained as sawmill manager after Summers succeeded to Olberg's job.

[22] Derum likewise eventually recalled having heard Summers say he wanted to "break the Union." But Derum was clearly a reluctant witness, and the testimony he gave that tended to support the General Counsel was offered only grudgingly, and with many evasions, self-contradictions, and disclaimers, including highly implausible claims that he had been tricked or pressured by the investigating Board agent into signing an affidavit in which he had not been so cautious as he was now in his testimony about Summers. For these reasons and others noted below, I would give no independent weight to Derum's testimony.

[23] These were, John Doss, the Respondent's chief financial officer since 1985, who regularly dealt with Summers, and was part of the management "control group" closely involved in the 1993 bargaining; and Robert Patterson, a nonstriking log yard worker who had regularly interacted with Summers over the previous decade, especially when Summers had responsibility for the log yard as part of his head forester duties.

ultimate judgment, and even where such evidence exists, it may not be enough, alone, to warrant a finding that the employer conducted its bargaining with the intention of frustrating the possibility of an agreement. For example, in *O'Reilly Enterprises*, 314 NLRB 378 (1994), the Board dismissed bad-faith bargaining allegations against an employer despite the fact that, only shortly before contract renewal negotiations began, the employer's president unlawfully coerced employees in ways that clearly showed that she wanted to oust the union,[24] and despite the further fact that the employer had unlawfully given the employees a pay raise unilaterally. In dismissing the bad-faith bargaining counts, the *O'Reilly* Board said this (314 NLRB at 378):

> [A]lthough O'Reilly's coercive conduct, together with Respondent's preimpasse implementation of proposals are part of the totality of the Respondent's conduct, they are not sufficient, when weighed against the Respondent's willingness to compromise at the bargaining table, to warrant the conclusion that the Respondent was seeking to avoid agreement.

It is with *O'Reilly's* holding particularly in mind that I doubt that I need to decide the credibility conflicts about Summers' alleged antiunion statements. For even if I were to substantially credit the General Counsel's witnesses, what they disclosed would not carry decisive weight in my final assessments of the Respondent's 1993 bargaining intentions. Thus, I will find that the Respondent, too, made some "compromises" during bargaining, and that its bargaining table conduct does not otherwise furnish any substantial support for the prosecution's bad-faith claims. In addition, even assuming that the prosecution witnesses testified truthfully about Summers' statements, they were describing statements made during periods quite remote to the 1993 bargaining period. (If I credit Olberg, Summers made such statements at uncertain times and in uncertain contexts before early January 1991, when Summers was Olberg's subordinate. If I credit Pelzer and/or Derum, Summers also made such statements at uncertain times and in uncertain contexts before mid-October 1992.) Moreover, because Summers' position at material times was subordinate to that of the Respondent's owners, and he was not shown to have been personally empowered to direct the bargaining behavior of Wise, the man the Respondent hired to represent it in 1993 bargaining with the Union, it is not obvious that Summers' own feelings and wishes concerning the Union would dominate the Respondent's 1993 bargaining positions or behavior. Thus, the dispute about whether or not Summers made antiunion statements prior to October 1992 diminishes even further in its evidentiary significance to this case.[25]

Against the possibility that a reviewing body might disagree with this analysis, and remand for credibility findings, however, I will record the considerations that inform my judgment, in the alternative, that the General Counsel's witnesses were not reliable:

> At the outset, I find that Derum's testimony deserves no weight; he was uncomfortable, reckless, self-contradictory, clearly hostile to the General Counsel, and clearly more interested in disavowing statements he made in his pre-trial affidavit than he was in giving a truthful rendition of underlying events.[26] I have also considered a collateral controversy involving Derum: Harold Hyatt, a bargaining unit employee and shop steward, testified that shortly before Derum's October 1992 layoff, Derum spoke in an "upset" state to Hyatt about being laid off, during which he reported that the Respondent's chief financial officer, John Doss, had recently told Derum that "they're thinking about closing the plant for a little while, and then opening up as a nonunion plant."[27] Doss convincingly testified that he never said any such thing to Derum (and Derum waffled on the point unilluminatingly). I will assume that Hyatt's account of his conversation with Derum was truthful. But considering that Derum was the source, and that Derum was apparently disgruntled at the time, and that Derum proved himself to be a reckless and unreliable witness in this trial, I would give no weight to whatever "admission" by Doss might be inferred from Hyatt's account of his conversation with Derum.

This leaves for consideration whether Olberg and/or Pelzer deserve more credence than Summers and/or Mueller or other witnesses called by the Respondent to directly or indirectly refute the General Counsel's evidence. I judge that they do not, and in reaching that judgment, I am influenced not at all by "demeanor,"[28] but instead by the following considerations:

Potential Bias or Interest: As current management officials, Summers, Mueller, and others, supra, may be presumed

[24] The Board sustained the judge's finding that Company President O'Reilly violated Sec. 8(a)(1) when she solicited a driver's signature on a "petition to enable the [employer] to sever its relations with the Union," and assured the hesitant driver that she would "take good care of him if he signed it[,]" and when she later coercively questioned the same driver about his attempts to dissuade employees from signing the petition. 314 NLRB at 379, 380. (The judge also found that O'Reilly violated Sec. 8(a)(1) when she told another driver that, "without the Union . . . it would be family again." Id. at 379. Without disturbing the judge's fact-finding, however, the Board found it "unnecessary to pass on the judge's finding that [this statement of *O'Reilly*] constituted a violation of Section 8(a)(1), since such a violation would be cumulative and does not affect the remedy." Id. at 378.).

[25] For these purposes, it is useful to contrast Summer's position with the Respondent with that of the company president in *O'Reilly*, supra. There, Elizabeth O'Reilly's obvious wish to get rid of the union not only manifested itself shortly before bargaining began, but her top position in the company invited a presumption that she would have had strong influence over how her company would conduct its bargaining. And even in those circumstances, the Board found O'Reilly's nearly contemporaneous antiunion statements away from the bargaining table to be "not sufficient . . . to warrant the conclusion" that her company was "seeking to avoid agreement."

[26] The General Counsel urges me to find that versions given by Derum in his affidavit were more reliable than versions he advanced from the witness stand. Given Derum's singularly poor performance as a witness, however, including his apparent penchant for shifting his story, depending on whom he was currently mad at, the only way I could "credit" his affidavit would be to find that it is consistent with what Pelzer reported, in which case it would be Pelzer's credibility that would carry the day, and Derum's affidavit would carry no independent weight. In fact, I have no confidence that Derum ever gave a truthful account of material events in his various sworn statements in this case.

[27] In receiving this testimony over the Respondent's hearsay-within-hearsay objection, I judged that Derum, still a supervisor at that time, was capable of making a nonhearsay "admission" under Rule 801(d)(2)(D), Fed.R.Evid. (And so, too, was Doss, who, under Hyatt's version, was the party Derum was purporting to quote.)

[28] In their pertinent testimony, Olberg and Pelzer testified with an air of conviction, but so did Summers and Mueller (and others called on these points), and nothing about the manner of any of these witnesses made one more convincing than another.

to have an interest in vindicating the Respondent's position in this litigation. By contrast, Olberg and Pelzer, no longer employed by the Respondent, would superficially appear to have no stake in the outcome, and their accounts might therefore be presumed to be the more candid ones. I, however, think these considerations are largely outweighed by specific indications of personal bias on both Pelzer's and Olberg's part. Thus, Pelzer was laid off in October 1992 while other supervisors were allowed to stay on, and he admitted, although elliptically, that he believed that others should have gone before he was asked to leave. And in Olberg's case, the record contains clear evidence that Olberg bitterly resented his own, January 1991 ouster by the Respondent, and that Summers was the particular target of this resentment. Thus, in December 1991, nearly a year after resigning under threat of termination, Olberg filed a defamation lawsuit in an Oregon court against Summers, personally, naming also another individual as one who had allegedly published Summers' alleged defamations. Olberg's suit materially alleged that, "[o]n or about January 1, 1990," Summers had set the defamation of Olberg in motion by making "various statements" to the second defendant suggesting that Olberg would be "removed" from his position with the Respondent "for embezzling money." He alleged further that the second defendant's publication of these defamations[29] "caused him to be terminated" by the Respondent, with attendant loss of earnings and benefits worth no less than "$125,000 per year." In May 1993, however, Olberg caused this suit to be dismissed before its merits were heard (in fact, just before depositions were to be taken), and did so for no palpable consideration.[30] Considering all this, I wonder if both Pelzer's and Olberg's testimony does not trace from a spiteful wish to get last licks in against the employer who terminated them.

Interestingly, two of the three persons named in Olberg's lawsuit complaint as having heard the second defendant's "publication" of the alleged defamations were "Willy Peltzer [sic] and Dennis Durham [sic]."

Quality of Testimony: The most strikingly suspicious common fact about Olberg's and Pelzer's testimony is that, although given repeated opportunities to try to summon up details of the timing and context in which Summers allegedly made antiunion statements, they could not (or would not). Invariably, they dodged these questions with disclaimers to the effect that Summers had made virtually the same statements so many times that they could not recall any details about any given statement. (Indeed, Olberg described Summers as having been "obsessive[ly]" driven to make such statements, and Pelzer insisted that in many cases, Summers would merely make such statements "out of the blue.") Given the passage of time, and Olberg's and Pelzer's insistence that Summers made antiunion statements repeatedly, it is understandable that these witnesses, even if truthful, might not be able to recall details of timing and context in all alleged instances, nor perhaps even in most of them. But I cannot so easily dismiss Olberg's and Pelzer's utter inability to recall any particulars of any such alleged instance. Moreover, I judge it wholly improbable that Summers would have spontaneously blurted out such antiunion statements, as Pelzer claims, much less that he would have used nearly identical words each time, as both Olberg and Pelzer also insist. In the end I suspect that their testimony, although delivered for the most part with bluff assurance, was artificially contrived, and that their professed inability to recall any details of timing or context was likewise a contrivance, intended to limit opportunities for specific rebuttal by the Respondent.

(Lack of) Corroboration: Olberg and Pelzer (and Derum, for that matter) do not genuinely corroborate one another's versions, except in the quite trivial sense that each claims to have heard Summers make antiunion statements more than once. (It's worth recalling in this regard that Olberg was talking about pre-1991 events, whereas Pelzer and Derum were asked to focus on statements by Summers after Olberg's departure and prior to their own departures in mid-October 1992.) In any case, because their versions were so vague as to timing and context, it is impossible to ascertain if they were describing incidents that they commonly witnessed, or entirely separate ones.

Accordingly, apart from questions of weight, discussed at the outset, I treat the General Counsel's evidence in this area as too unreliable to properly figure at all in my assessment of the intentions underlying the Respondent's 1993 bargaining behavior.

III. CENTRAL EVENTS

A. 1993 Bargaining Preparations

On March 8, Dean Killion, the financial secretary of the Union's "Local 3-1," mailed a four-page letter to the Respondent, giving "notice . . . that this Local Union requests opening of our labor agreement and negotiation of revisions and amendments thereto[,]" and authorizing the IWA (the Union) to represent it in negotiations for that purpose. The letter also outlined the revisions and amendments the Union was seeking; these included nonspecific demands for "substantial increases" in pay and in employer contributions to existing health and welfare and pension benefit plans, other "improvements" to those benefit plans, and "improvements," as well, to existing provisions in the contract dealing with such items as vacations, holidays, and funeral leave.

On March 25, 1993, Summers, together with other officials of the Respondent and a third-party consultant named Gossard, met in a strategy session with Kellye Wise, who, as previously noted, is an attorney employed by Timber Operators Council (TOC). (TOC and the Union have for years dealt with one another in negotiations for labor agreements covering various employer bargaining units in the timber products industry in the Pacific Northwest, and they are cotrustees of industry health and welfare and pension trusts, commonly referred to as the "TOC-IWA" trusts.) Also as I have noted, the Respondent eventually disclosed in response to the General Counsel's trial subpoena a four-page set of typed notes, captioned "1993 Contract Negotiation Strategy," and the General Counsel eventually introduced these notes into evidence. The notes were made by Summers in preparation for this March 25 session with Wise,

[29] In their pertinent testimony, Olberg and Pelzer testified with an air of conviction, but so did Summers and Mueller (and others called on these points), and nothing about the manner of any of these witnesses made one more convincing than another.

[30] Olberg explained that by May 1993, the "noise [had] stopped," and that he had thus "accomplished [his] goal" in filing the lawsuit. Olberg's lawyer, however, explained the lawsuit dismissal somewhat differently, in a May 12, 1993 letter to the lawyer representing Summers and the other individual defendant: There, Olberg's lawyer said (my emphasis), "In discussing the matter with Mr. Olberg in preparation for scheduled depositions, it was apparent that *passions have cooled*, and he authorized me to dismiss this matter as to these two defendants."

and were apparently used as talking papers during that session. Under the heading "Contract Issues" were listed the following items, reflecting the Respondent's preliminary wishes:

(1) "Maintain the same wage rate as our last contract with the option of an increase based on an incentive plan."

(2) "Terminate the existing [TOC-IWA] health and welfare plan and incorporate the same plan as nonunion (possibly include co-pay)."

(3) "Freeze the existing union [TOC-IWA] pension plan and merge sawmill employees with existing company 401-k plan."

(4) "Reduce maximum vacation to 3 weeks."

(5) "Reduce number of paid holidays to 6 or 7."

(6) "Eliminate the checkoff and union shop articles."

(7) "Change the seniority system in order to integrate competency as the determining factor."

(8) "Implement random and blanket drug testing."

(9) "Flexible work hours (i.e.: weekend work schedule for maintenance)."

Most of the items on this management wish list were included in one form or another in the Respondent's eventual proposals to the Union. There are, however, at least two distinct exceptions: First, the company's wish to "[e]liminate the checkoff and union shop articles" was scrapped immediately, on Wise's advice that this demand did not relate to the Respondent's stated goal in negotiations, which was to achieve enough reductions in "labor costs" to allow it to bid successfully on logs and still operate the sawmill profitably. Second, the Respondent's wish to "[t]erminate the existing health and welfare plan," became transmuted into a proposal to "cap" the Respondent's contributions to the TOC-IWA health and welfare trust at current levels of $1.65 per hour per worker.

Summers' March 25 notes also suggest that the Respondent at least doubted that an agreement could be reached with the Union, for they are mostly devoted to various "Operations Plan" scenarios that "assume" a strike would begin on June 1.[31] And, while the notes alone do not show that the Respondent envisioned a strike as inevitable, Summers' testimony makes it clear that the prospect of a strike was distinct enough to cause the Respondent to invest early on in certain "strike security" measures, most notably, the purchase and installation—in March—of a chain-link fence that still surrounds the sawmill, leaving only an opening on railroad right-of-way through which freight cars might pass to and from the mill's lumber loading bays.[32]

I rely on Summers' eventual admissions, following some preliminary weaseling, that the fence was purchased and installed in or about "March," and was for a "strike-security" purpose.

On March 30, Summers wrote to Chuck Macrae, an IWA vice president who would be the Union's chief bargaining representative. Summers advised Macrae that the Respondent was "elect[ing] to terminate the labor agreement," which, as Summers further explained, was intended to mean that "each and every term and condition of the labor agreement [would be] open for negotiation." Summers promised to "present a proposal outlining our specific opening [demands]." He also announced that Kelly Wise would "assist us in these negotiations," and confirmed his "understanding [that] an initial meeting has been tentatively set for Monday, April 12, 1993."

B. The Bargaining Sessions

Having exchanged formal opener letters in March, the parties met thereafter for bargaining purposes on five occasions, on April 12 and 29, May 10, and June 17 and 24. Throughout these negotiations, the Union's bargaining team was headed by Macrae, and included Local 3-1 Business Agent Killion, when his health permitted. Wise headed the Respondent's team, which also included Summers. Macrae and Wise had agreed in their first meeting that each would be deemed the "spokesman" for his respective team. Wise and Macrae appear to disagree concerning only a few details of what happened during this period, and they are ones not significant enough in my view to require a credibility resolution.[33] Their testimony is otherwise harmonious with these additional findings, which are also informed by the documentary evidence:

In the first session, the discussions focused on the now-fleshed-out details of the Union's opening proposals, which included a 3-year term, hourly pay increases totaling 16 percent over that term (6 percent in the first year; 5 percent in succeeding years), the "elimination" of (special, lower) "new hire rates," plus a 2-percent "signing bonus."[34] In the second, the Respondent submitted an "outline" of its own proposals, which were somewhat more detailed than previously outlined in Summers' March 25 "Contract Issues" notes, supra, and had been changed, as previously noted, by dropping a wish to eliminate the "checkoff and union shop articles," and by proposing to stay within the TOC-IWA health and welfare plan, but with a cap on the Respondent's contribution rates. The third session was mainly argumentative in tone, and the last two sessions were held, by agreement of both parties, under the auspices of a Federal mediator. In the final session, the Respondent presented a yet more comprehensive and specific listing of proposals as its "last and best offer," which the Union

[31] "Plan A" contemplated operating only the mill's "log yard, quad mill, and planer with salaried and temp personnel." "Plan B" proposed idling the mill entirely for up to 6 months, while the Respondent continued to buy and sell unmilled logs. "Plan C" envisioned operating the mill by "hir[ing] replacements immediately thorough [sic] temp organizations[,]" but with "the goal" being "to get as many [of the current unit employees] as possible to cross the picket lines." (And in this latter regard, Summers had noted, "We must inform them that they would have to withdraw from the union before crossing the pickets to keep from incurring fines.") Finally, "Plan D" contemplated, simply, "Shut down mill and liquidate after a period of time."

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[33] For example, Macrae asserts—and Wise denies—that Wise told Macrae in an informal conversation prior to June 17 that the Respondent was not following his "advice," but was getting it from elsewhere.

[34] Macrae conceded from the witness stand, in substance, that the Union's opening proposal was intended to get pay and benefit increases and other enhancements from the Respondent that matched what the Union had tried in 1992, albeit unsuccessfully, to get from the larger employer-players in "the industry."

agreed to take back to the sawmill crew, but with a recommendation for "strike authorization," not acceptance.

The parties never got very close to an agreement during the negotiations. Throughout, the Union sought hourly pay increases (although it eventually trimmed back from its initial demands in this regard[35]); it also sought continuing company participation in the TOC-IWA trusts (with increasing company levels of contributions to the trusts), plus health and welfare benefit enhancements and other "improvements" that implied still higher costs to the Respondent (which latter demands were never discussed very specifically, apparently due to the parties' more fundamental differences).

For its part, the Respondent claimed throughout negotiations that competitive pressures–especially its competitors' ability in recent timber sales to make higher bids than the Respondent could make–required it to reduce, not increase, its labor costs.[36] The Respondent, however, did not argue current inability to pay what the Union was asking for, rather, its emphasis was on its longer-term needs for a predictable log supply.[37] Thus, the Respondent, although willing to maintain current hourly wage levels[38] (and eventually, to "sweeten" its incentive pay scheme and to broaden existing funeral leave options) wanted to cap its contributions to the existing TOC-IWA health and welfare trust at $1.65 per compensable hour, even though both parties knew that the trust was now or soon would be calling for $2-per-hour contributions. (The Respondent proposed to bridge the gap by having the employees contribute the difference.) Moreover, the Respondent sought throughout negotiations to achieve overall labor cost savings by a variety of other devices, including by substituting a (never fully explored) 401(k) plan for the current "Union pension plan," and by obtaining various "language" changes, most notably, changes calculated to give the Respondent the right to subordinate "seniority" to "competency as determined by the Company" when it came to job-bidding or other personnel changes, and the right to "require" overtime work, and the right, upon 10 days' prior notice to the Union, to change established work schedules "to fit production and maintenance needs[.]"

The obvious disparity in the parties' respective bargaining goals had caused Wise to comment in a letter to Macrae on May 13, just after their third session, that the parties were still "far apart," in that the "company" was still asserting "the need for labor cost savings in order to be competitive," whereas "the union remained insistent on a package which would include significant cost increases."[39] Wise added, however, that he and Summers had met on May 12 with "the management group," and that "the company's hope continues to be that a mutually agreeable resolution can be reached." And to this end, Wise proposed that a Federal mediator attend the next meeting, to which the Union agreed.

In the last meeting on June 24, after the Union had previously trimmed its wage increase demands, the Respondent submitted a detailed, written "Employer Proposal." This proposal also reflected some movement. Thus, although it held firm on capping of hourly pay at current rates, the Respondent sweetened its existing production incentive bonus plan (25 cents per hour in any month where production averaged 200,000 or more board feet) with an offer of an "additional" 10 cents per hour in any month where the production averaged 215,000 or more board feet. The Respondent also "agree[d] to [the] Union proposal" on funeral leave (in effect, agreeing to extend funeral leave to include deaths of grandchildren). Also reflecting movement, the Respondent abandoned its proposal to trim the number of paid holidays and proposed instead to "maintain [the] present number of paid holidays." But these movements still left the parties far from agreement on pay rates, vacations, scope of health and welfare benefits and employer contribution levels, 401(k) versus "Union pension plan," the proper weight to be given seniority, and the scheduling of hours of work and overtime.[40]

[35] In the June 17 meeting, following a union caucus, Macrae trimmed the Union's hourly pay increase demands to 4 percent in year one, 3 percent in year two, and a flat 40-cent-per-hour raise in year three. He also dropped the "signing bonus" demand, but adhered to the demand for elimination of "new hire rates." Macrae conceded in this regard that these reduced demands had been calculated to match the 1992 "industry settlement."

[36] In the April 29 meeting, when the Respondent first presented in outline form its own proposals for a new agreement, it also furnished the Union with a document captioned, "Recorded 1992 Timber Sale Results for Taylor Lumber & Treating," which showed that the Respondent had been substantially outbid at eight timber sales in 1992, including three in December 1992.

[37] Macrae conceded as follows during cross-examination:

> Q. Hadn't the company explained to you in negotiations that their financial condition was not the problem, that it was not an inability to pay, but rather an inability to obtain logs to run the sawmill?
>
> A. The Employer, through Mr. Wise and Mr. Summers had indicated during bargaining that they, number one, were not pleading inability to meet our demands, and that number two, that that operation up to that point was in fact a profitable operation, yes, they did.
>
> Q. And that the problem was the inability to obtain logs?
>
> A. I don't know that they–in response to those questions, they continued to reiterate that their problem was inability to buy logs. They–they made a strong point in bargaining that log supply for that mill was a big issue, yes, they did.

[38] Thus, that subcount within the complaint which alleges that the Respondent "proposed and insisted upon *significant reductions in wages*" is clearly contradicted by the universally conceded fact that the Respondent was willing from the start to continue to pay the then-current hourly rates.

[39] Macrae conceded in testimony that he told Wise—apparently in the May 10 meeting, and perhaps others—that the Union did not "intend to agree to wage and benefit reductions," and further concedes that he told Wise on May 10 and/or other dates that" "we didn't intend to bargain concessions, that we had had our bout with this Employer and the industry with concession bargaining, and it didn't–it didn't work then and we didn't intend to do it again." More grudgingly, Macrae conceded that he "may have" also said that "the crew will not buy into a concession package," and that "the crew expects us to agree to the same type of settlement as the balance of the other companies." I find it probable, given the Union's admitted overall wish to get wage and benefit increases for the workers consistent with the 1992 "industry settlement," that he also made statements to the latter effect, as Wise testified.

[40] In addition, although the Respondent's June 24 last offer contained a specific proposal on substance abuse and testing, the parties had not come close to agreement on that subject. Unlike the issues summarized above, however, the drug-testing controversy does not appear to have been seen by either party as having an economic impact, and does not appear to have been explored to any great extent before the June 24 session ended, seemingly because both parties were more concerned about the economic issues (including those characterized as "language" issues, such as the Respondent's wish to have language allowing it to change "hours of work" on 10 days' advance notice to the Union).

Toward the end of the June 24 meeting, following a caucus of the union team, Macrae told Wise that the Respondent's proposal "seemed to be designed to be rejected."[41] Wise told Macrae that, under the Respondent's calculations, its own proposals would achieve roughly $400,000 in labor cost savings over the life of the contract, whereas the Union's proposals would increase costs by about $350,000 over the same term. After Wise confirmed that the Respondent had presented its best and final offer, Macrae told Wise that he would take the proposal back to the crew, but would seek "strike authorization" from them.

C. Followup Correspondence; Immediate Prestrike Events

Wise wrote to Macrae on June 29 to clear up what he believed, "[u]pon reviewing my notes of the June 24th bargaining session," was a "misunderstanding regarding the Company's health and welfare proposal . . . of June 24, 1993." Specifically, Wise recalled that Macrae had "indicated that our proposal precluded participation in the TOC-IWA Trust because co-pay of premium was not provided for by the trust." Disagreeing with this, Wise stated that he "believe[d] that our proposal would still comply with the participation terms of the trust[,]" and went on to explain why he thought so. Wise further stated, moreover, that "[s]hould there be some other reason which would prohibit Taylor Lumber from participation, we would immediately meet with you to investigate alternative health and welfare coverage within the Employer's $1.65 per compensable hour cap." Finally, noting that the "Unions committee" had expressed fears that, under the Respondent's proposal, "the employees could be left with no health coverage[,]" Wise closed by reaffirming that such an outcome "has not, nor ever has been, the Company's proposal or intent."

On July 8, Macrae called Wise and told him that, in a union meeting held the night before, the crew had unanimously rejected the company proposals and had authorized a strike. As Wise agrees, however, Macrae explained that the workers had been "especially incensed by the language issues that [the Respondent] had put on the table, and . . . that if we got rid of the . . . 'bullshit in the language,' he would be willing to discuss the economics, if they were justified[, but that] . . . the ball was in our court, [and] that if we declared impasse, he wouldn't argue."[42]

On July 15, in a letter to Macrae, Wise opened by declaring his own and the Respondent's belief that "we are at an impasse," and summarized why they had reached this belief. He mentioned prominently the Union's consistent "disagree[ment] with and refus[al] to accept the Company's position that [it] needed certain cost savings to increase its competitiveness," the Union's refusal to accept "the company's proposed language changes," despite the Respondent's having "stressed that . . . flexibility of operations was a primary concern," and the employees' July 7 rejection of the Respondent's proposals and strike authorization vote. After further reviewing the parties' bargaining history to date, Wise repeated that "it is apparent . . . that we are at an impasse[,]" and that he had so notified the Federal mediator, who "has indicated that she will continue communications with both parties should something change." Wise closed by advising Macrae that "our intent is to evaluate Taylor Lumber Company's position in light of the union's rejection, and the present business environment[,]" and by suggesting that Macrae contact him if he should have any "further questions."

In a reply letter to Wise on July 19, Macrae did not challenge the notion that the parties were at impasse, but he challenged the Respondent's good faith in the bargaining that had led to that impasse, and made several complaints about the Respondent's conduct. These included assertions that the Respondent's bargaining agents had not adequately responded to the Union's various requests during bargaining for "information to support the need for [labor cost] reduction,"[43] and had not "ask[ed]" the Union for ideas about "how they might get these labor cost reductions," but rather, had "dictated where they must come from[,]" and had given no "example of not being able to get people to cover their overtime needs . . . [nor] of the Union not agreeing to change shift schedules during the contract term[,]" and had given "no reason as to why the substance abuse program used by the bulk of the industry would not work for them." Macrae closed by expressing his "hope that Taylor Lumber Company will re-evaluate it's [sic] position and make a good faith effort to resolve our difference before the chain of events are set in motion that will not be pleasant for the Company or for the Union."

In a reply letter to Macrae on July 28, Wise repeated familiar general themes, and disputed the Union's complaints about the Respondent's bargaining behavior. In this latter regard, he asserted (consistent with Macrae's testimonial admissions about the bargaining sessions) that the Respondent had "explained the present status of our log supply, as well as the long-term outlook on raw materials," and had provided "documentation" of its failure to bid successfully on timber sales, and had explained its proposal on health, welfare, and pension in terms of the Respondent's need for a "known, stable, cost for a period of time." Concerning other complaints, Wise turned the table: Thus, he averred that "[a]t no time has the Union Committee suggested any alternative means for reducing labor costs." And as to substance abuse policy, Wise stated that the policy had been discussed with the "local Union Committee" in the past, and had "not met with strong opposition[,]" and in any case, that it was not "reasonable" for the Union to "reject [the Respondent's proposal] out of hand," just because "the policy is not the same as other companies[']." Wise also took issue with the Union's "position" that the Respondent "should agree to terms similar to those agreed to by companies that are generally much larger, and not in the same situation as Taylor Lumber." Instead, wrote Wise, the Respondent's "competition for log supply is with independent mills, most of whom are fighting for survival just like us."[44] And in his closing paragraph, Wise

[41] Macrae further admits that he "may have" referred to the Respondent's proposal as a "chicken shit offer."

[42] Here I rely on the credibly stated and plausible recollection of Wise. Macrae did not concede having made such an "impasse" statement in this conversation, but neither did he deny having done so.

[43] Nothing in the record shows that the Union made any specific request for information bearing on the Respondent's claimed need to lower labor costs that was refused by the Respondent. Moreover, the complaint makes no claim that the Respondent unlawfully refused to furnish information. It appears, in fact, that Macrae was not persuaded by the information the Respondent did furnish on this subject (such as its chart of unsuccessful 1992 timber bids), and simply argued in the bargaining sessions that the Respondent should not expect the unit employees to "pay" for shortcomings in the Respondent's own management, such as "incompetence" on the part of its timber buyer.

[44] Macrae agreed as a witness that the Respondent had taken this position early on in the negotiations, and had named a number of compa-

echoed the theme that the Respondent saw its very "survival" at stake, and for this reason had made "improving our capability to purchase logs" its main "objective."

When these exchanges failed to cause either party to make any further movement,[45] Wise wrote to Macrae on August 9, announcing in material part as follows:

> [T]he Company has discontinued negotiations for the purposes of terminating the present collective bargaining agreement. We have been at impasse for several weeks. This is to inform you that we will be implementing our final offer effective August 16, 1993. A copy of that final proposal, presented to the Union Committee on June 24, 1993, is enclosed.

On August 12, the Respondent mailed identical, three-page letters to each of its bargaining unit employees, announcing the bargaining impasse and the Company's intention to implement its last offer on August 16. The largest part of the letter purported to give "answers" to "questions" about employees' rights "in the event some form of strike action is actually called by the IWA." The questions and answers focused on employees' rights to continue working during a strike, and on how to do so without being vulnerable to union fines.[46] Among other things, the Respondent said to each recipient that it "hoped" there would be no strike, and "hope[d]" also that "you will choose to work," but would in any case "give serious consideration to whatever decision you make on these matters."

D. August 16 Strike; More Correspondence; December 9 Offer to Return; Company Operations in Between

At about 6 a.m. on the morning of August 16, apparently shortly before shift start, the Union's Local 3-1 convened a meeting of the bargaining unit employees, attended by about 64 of them. Killion, the Local's soon-to-retire business agent, read aloud from the Respondent's August 12 letter to employees. Various voices were heard from the floor, protesting that the Company was "out to break the Union." Killion counseled that the employees had options to striking, such as staying on the job under the Respondent's terms, but making it "the safest sawmill in the industry,"[47] and suggested further that the Union would file bad-faith bargaining charges with the Board. When the vote came, however, the employees unanimously chose to strike, recorded in the minutes of the meeting as a strike to protest the Company's "unfair tactics." The strike began immediately.

On August 25, the Union filed its first unfair labor practice charges with the Board, alleging bad-faith bargaining by the Respondent. Macrae and Wise conferred by telephone the same morning, and on September 2, Wise wrote to Macrae, enclosing a packet of documents "pertain[ing] to both the company's labor costs, and their raw material situation." Wise said in his cover letter that these documents were being "provided with the hope that the workers may better understand the company's position and proposal." The documents he enclosed included summaries of the Respondent's "direct labor costs vs. total operating costs" in the period March 1, 1992, through July 31, 1993, plus figures showing "daily average production" for months from November 1991 through July 1993, plus excerpts from industry trade publications charting swings in log prices from 1990 through July 1993.

The Regional Director initially dismissed the Union's bad-faith bargaining charges on an uncertain date, but the Union successfully appealed to the Office of the General Counsel, who authorized a complaint sometime in early December. Thus it was that Macrae transmitted the following letter to the Respondent, addressed specifically to Summers, on December 9:

> In light of the National Labor Relations Board issuing the complaint and declaring this to be an unfair labor practice strike, the Union, on behalf of your employees, makes the following offer:
>
> The employees offer to immediately and unconditionally return to work under the contract that was in effect prior to the strike and to resume contract negotiations.

In a letter to Macrae mailed on December 14, Summers replied, "We respectfully decline your offer."

The Respondent kept the mill idle during the strike, and sold off a good part of its log yard inventory, in part to improve its cash flow, and in part to avoid a roughly $500,000 tax bite it faced if it held onto certain logs in its inventory any longer. It also bought small lots of logs at different times, mainly to maintain relations with suppliers who might otherwise form new customer relationships and become unavailable to the Respondent in the future. One bargaining unit log yard worker who had not joined the strike, Robert Patterson, remained on the Respondent's payroll, apparently full time, although it also appears that his performance of bargaining unit work was limited to shipping and receiving tasks associated with the Respondent's sporadic selling and buying of logs. Patterson continued to receive the same pay rate as before the strike, and was now being covered by the medical benefits plan covering the Respondent's unrepresented employees in its pole treatment plant.

IV. CONCLUDING DISCUSSION; ORDER

A. The 8(a)(5) Counts in the Complaint

When I judge the merits of the pivotal, bad-faith bargaining count in the complaint, I am required first to operate within the mandate of Section 8(d) of the Act, which instructs pertinently that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." I am further required by the authorities to focus on the Respondent's bargaining intentions, and particularly on the question whether the Respondent conducted its bargaining with the intention of "avoiding," or "frustrating" an agreement.[48] This question surely invites an examination into the "totality" of the Respondent's conduct, and such an examination may even require attention to the content of the Respondent's bar-

nies whom it judged were its competitors (most or all of which names, incidentally, were companies that Macrae knew to be nonunion operations).

[45] Clearly these exchanges did not in themselves suggest movement by either party, and I give them little independent weight, for I largely regard them as mutual jockeying for legal position.

[46] The prosecution does not attack these questions and answers as involving any threats, coercive misstatements of employee rights, or any other kind of violation.

[47] Testimony of now Local 3-1 Business Agent Lloyd Carver, supplemented by Killion, who recalls telling the assembled workers in this regard that they could "report every safety violation and every EPA or environmental violation."

[48] E.g., *Reichhold Chemicals*, 288 NLRB 69 (1988); *88 Transit Lines*, 300 NLRB 177, 179 (1990); *O'Reilly Enterprises*, supra, 314 NLRB at 378.

gaining proposals and/or its failure to make concessions.[49] But while the content of an employer's proposals may be taken into account in this analysis, I am adjured by the Board not to judge the employer's proposals simply in terms of their "'acceptab[ility]' or 'unacceptab[ility]' to a party," and moreover, to "strive to avoid making purely subjective judgments concerning the substance of proposals."[50] Indeed, I am instructed that in judging any attack on the content of an employer's proposal, the ultimate test is "whether, on the basis of objective factors, a demand is *clearly designed to frustrate agreement on a collective-bargaining contract*."[51]

I don't think the record convincingly shows that the Respondent's bargaining conduct was clearly designed to frustrate agreement. Rather, I think the record shows that the Respondent's bargaining proposals and bargaining conduct were consistent with those of an employer willing and trying to reach an agreement that would satisfy its claimed economic needs. Moreover, this record contains no reasonable basis for supposing that the Respondent's claim of economic need was itself false, much less that the bargaining proposals it developed and advanced in aid of those needs were themselves adopted purely to serve as obstacles to agreement. Indeed, the Respondent's claimed reasons for advancing its new contract proposals–to reduce overall labor costs to a point that would improve the Respondent's ability to make a break-even bid for timber and logs–were never seriously challenged in this litigation, and they were supported by documentation and circumstantial evidence. These two main points weigh most heavily in my ultimate conclusion that the Respondent engaged in no more than lawful, "hard" bargaining in aid of legitimate economic goals. But I did not reach this conclusion without first considering other features of the Respondent's conduct in its totality. Thus, I have also considered the following arguments and points made by the General Counsel and the Union, but have found them wanting for the following reasons:

Throughout his brief, the General Counsel rides hard on the discredited testimony of Olberg, Pelzer, and Derum about alleged pre-October 1992 statements by Summers. For reasons I have already thoroughly discussed, their testimony, even if true, would deserve little weight, and none at all given my finding that each was an unreliable witness.

The General Counsel sees evidence that the Respondent did not really intend to reach an agreement in the Respondent's having planned on March 25 for various strike eventualities, and especially in having built a fence for strike-security purposes even before the parties began bargaining. I think this evidence is, at best, equivocal in its implications. Certainly, if the Respondent did not intend to reach agreement with the Union, it would anticipate the likelihood of a strike, and therefore its strike planning would be consistent with such unlawful intent, but just as surely, the fact that the Respondent engaged in strike planning does not necessarily mean that it wanted no agreement. Rather, such planning in late March would be equally consistent with the Respondent's realistic belief, in the light of the Union's initial, albeit vaguely couched demands for "substantial increases" in pay and "improvements" in other areas as well, that the Union would not likely agree on the terms the Respondent found important without first conducting a strike to test the Respondent's resolve. Moreover, the fact that the Respondent was evidently prepared to undergo a strike hardly proves that it welcomed one.[52]

The General Counsel's remaining attacks are directed almost exclusively against the content of the Respondent's own bargaining proposals, and its alleged refusal to make "meaningful concessions." To adequately address these types of attacks requires me first to do some deadwood clearing, that is, to identify the more obvious discrepancies between complaint and proof as to the Respondent's alleged "insistence" on certain "proposals," and its alleged "failure" to "offer meaningful concessions":

> The complaint alleges that the Respondent "proposed and insisted upon significant reductions in wages." In fact, the Respondent did no such thing; it proposed to freeze hourly pay at current levels, and eventually offered to sweeten its production-linked incentive pay premium. The complaint further alleges that the only "concessions" the Respondent made were to "alter its language [sic] on vacations[53] and on the Union's request to include grandchildren in . . . funeral leave." This set of claims ignores the Respondent's incentive-pay sweetener offer, and it ignores that the Respondent did not just "alter its language" on funeral leave, but actually "agreed" with the Union's proposal. Moreover, the complaint alleges that these admitted concessions were not offered by the Respondent "until after the last negotiations session," and only "just before implementing its proposal." It is clear from the General Counsel's own evidence that all of the Respondent's movement occurred before the close of the June 24 session; it is equally clear that the Respondent's concessions did not occur "just before" the Respondent "implement[ed] its proposal," for everyone has always agreed that it was not until nearly two months later, on August 16, that the Respondent planned to or did "implement" any changes contemplated by its last offer.

The complaint also avers in its attacks on the content of the Respondent's proposals that the Respondent "proposed and insisted upon significant reductions in health an[d] welfare benefits and pension . . . benefits." The record shows instead that the Respondent sought to "cap" its contributions to the existing health and welfare plan at current levels (but not to "reduce" them), and that it also sought to substitute a 401(k) plan for the existing pension plan. In fact, however, the General Counsel never sought to prove the particulars alleged in the complaint, that the Respondent's proposals in the areas of health and welfare and pension would have yielded reductions, "significant" or otherwise, in "benefits." And in fact, the record

[49] E.g., *Reichhold Chemicals*, supra at 69–70.

[50] *Reichhold Chemicals*, supra at 69.

[51] Id.; my emphasis. See also, e.g., *Litton Microwave Cooking Products,* 300 NLRB 324, 326–327 (1990).

[52] Further in this regard, the Respondent's installation of the security fence, seen by the prosecution as darkly significant evidence of the Respondent's unwillingness to reach any agreement with the Union, can just as easily be interpreted as a signal to the Union that the Respondent was prepared for a strike, made in the hope of persuading the Union to moderate its own demands rather than play the strike card.

[53] The complaint's suggestion that the Respondent made some "concession" when it "altered its language on vacations" involves inaccuracies of a different kind. The record unmistakably shows that the Respondent's June 24 proposal concerning vacation involved neither movement nor "altered . . . language," but instead was virtually identical in wording, and actually identical in substance, with its original, April 29 proposal.

affords no basis for judging how the Respondent's proposals might have affected the scope of benefits available to employees under the existing TOC-IWA plans. Thus, although the General Counsel still attacks the Respondent's proposals on health and welfare and pension, his attack has devolved to a challenge to the Respondent's right to seek any limits or changes at all in its own costs of providing such benefit coverage.[54] And so understood, I think the prosecution's lingering challenges in this area can be dismissed as being grounded in the "unacceptability" to the Union of any departure from the health and welfare and pension status quo (as established in the 1992 industry settlement) and as involving the kinds of "purely subjective judgments concerning the substance of proposals" that we are instructed to avoid making. Thus, in all the circumstances, I cannot see in the Respondent's benefit plan proposals anything "clearly designed to frustrate agreement."

The complaint also charges that the Respondent's bad faith was evidenced by its "propos[ing] and insist[ing] upon the elimination of seniority provisions [and] . . . upon elimination of the Union's right to negotiate over hours of work." In these respects, I think, the complaint has its facts basically right. Thus, it is true, at least, that the Respondent at all times wanted the right to subordinate "seniority" to "competency as determined by the Company" when it came to job bidding or other personnel changes, and the right to require overtime, and the right, upon 10 days' prior notice to the Union, to change established work schedules "to fit production and maintenance needs[.]" As to all such issues, however, it is clear that the Respondent rationalized these proposals at the bargaining table as a way to give it greater operational flexibility, and thereby to achieve further labor cost reductions. And, therefore, the mere fact that the Respondent wanted changes in these areas does not itself betoken a clear design on its part to frustrate agreement.

The General Counsel's attack on the Respondent's hours-of-work proposal deserves additional attention, for several reasons. The General Counsel now attacks that proposal not only because it allegedly demonstrates the Respondent's bad faith, but he further devotes a distinct section of his brief to the headline proposition that the "Respondent's Unilateral Implementation of its 'Hours of Labor' Proposal Is Independently Violative of Section 8(a)(5) of the Act." As I discuss next, the former allegation ignores the Board's decision in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991). And as I discuss in the next section, the latter proposition, although inspired by the same case, is clearly the product of afterthought, and constitutes an untimely attempt, sub silentio, to amend the complaint, an amendment which, in any case, remains essentially unproved on this record.

In *Colorado-Ute*, the Board found (id. at 609) that the respondent-employer's bargaining demand for the right unilaterally to grant "merit" pay increases on a highly discretionary basis necessarily was a demand that "[sought] the Union's waiver of its statutory rights [to bargain over any such particular increases] under Section 8(a)(5) of the Act." Critically, however, the Board found (id.) that the employer did not violate its duty "to bargain in good faith by insisting on its merit wage proposal," and held further that "the parties' impasse after the rejection of the Respondent's . . . offer was a lawful impasse[,]" because the employer "was free to insist to impasse as a condition to agreement on any wage terms that the Union agree to waive the statutory rights at issue here." Assuming, arguendo, that this Respondent's hours-of-work proposal may be similarly understood as implicitly requiring the Union to waive statutory rights to bargain,[55] these holdings dispose of the General Counsel's contention that the Respondent's insistence to impasse on that proposal is significant evidence that the Respondent was bargaining in bad faith.

B. "Independent" 8(a)(5) Claims not in the Complaint

In portions of the *Colorado-Ute* decision that the General Counsel now emphasizes, the Board noted further (id. at 609–610) that "the [employer's] freedom to pursue [its merit wage proposal] and to exert this bargaining pressure to obtain this end does not carry with it a right, once having failed and reached impasse, to proceed with implementation of the final offer as if the Respondent had successfully secured the Union's waiver." More specifically, the Board held that when the employer thereafter "implemented" its merit-pay program in the concrete sense of actually "grant[ing]" merit pay raises on a unilateral basis, that feature of its implementation was unlawful, in that, absent the union's actual waiver, the Respondent was "not free to grant increases without consulting with the Union about these matters." And It is this latter holding that now inspires the General Counsel to attack the Respondent's supposed August 16 "implementation" of its hours-of-work proposal as an "independent violation of Section 8(a)(5)."

I reject this claim for three main reasons, the first two of which are interrelated, and the last of which is sufficient in any case. First, the complaint contains no hint, much less fair notice, that the General Counsel would seek a finding that the Respondent's "implementation" of the hours-of-work feature in its last offer was "independently" unlawful. Thus, the 8(a)(5) counts allege in the aggregate only that the Respondent's bargaining in the "period" April through June was conducted in bad faith, i.e., to "avoid" an agreement, and with a "desire to rid itself of the Union"; they nowhere suggest that even if these "surface bargaining" counts were found meritless, the Respondent still had no right to "implement" the hours-of-work feature after impasse was reached. Second, where the Respondent had no fair notice that it might still be in legal jeopardy under Section 8(a)(5) even if the surfacing bargaining counts were dismissed, I would be loath to find that the facts relevant to the General Counsel's afterthought theory were fully and fairly litigated. Third, even if the General Counsel's "independent" theory of violation were not barred by constitutional due-

[54] In this regard, it's worth recalling that the Respondent explained at the bargaining table that it needed caps on its costs for health and welfare and pension programs, and that the Union did not voice any willingness to consider departing from the existing TOC-IWA plans (which were vulnerable to midterm changes in employer contribution levels), but rather systematically ruled out "concession" bargaining. And as a consequence, not only did this leave the Respondent's proposals largely unexplored, but it left its good faith in making them quite untested.

[55] The General Counsel rather summarily and confusingly argues (Br. 12) that "[a]lthough *Colorado-Ute* dealt with merit-pay increases[,] there is no conceptual difference [raised by the Respondent's hours-of-work proposal]. It [the *Colorado-Ute* holding, apparently] should apply to all cases involving mandatory [sic] subjects of bargaining[.]" I assume that the General Counsel means by this that the Respondent's insistence on its hours-of-work proposal required the waiver of a statutory right akin to that presented in *Colorado-Ute*. On this narrow point there is ground for doubt. See *Litton Microwave Cooking Products*, supra, 300 NLRB at 326 fn. 6; see also the judge's discussion of underlying facts and citation of authorities. Id. at 409.

process considerations, and even if it could be found that the relevant facts were fully and fairly litigated, I remain profoundly doubtful that the record would establish that the Respondent ever actually "implemented" its hours-of-work proposal in any concrete way. Thus, where it is undisputed that the strike began before the Respondent fulfilled its vow to implement its last offer, and that the sawmill remained idle during the strike, it would be strange to start with to imagine that the Respondent could "implement" a proposal to alter established hours of work in an empty mill. Moreover, although the record incidentally shows that one employee, Patterson, continued to do log yard work after the strike began, nothing in his testimony or elsewhere in the record shows that his customary hours of work before the strike were in any way changed after the strike began.

Separately, as I discuss next, my disposition of the 8(a)(3) count in the complaint does not require me to reach the question of the lawfulness under *Colorado-Ute* of the Respondent's supposed implementation of the hours-of-work feature of its last offer.

C. The 8(a)(3) Count

The General Counsel's theory of 8(a)(3) violation necessarily assumes that he will prevail on the surface bargaining count in the complaint, for it is on this basis that he characterized the strikers in the complaint as unfair labor practice strikers, entitled under familiar principles to immediate reinstatement on their unconditional offer to return. But even if I had found merit to the surface bargaining count in the complaint, the next obstacle the General Counsel must overcome in claiming that the Respondent violated Section 8(a)(3) by failing immediately to reinstate strikers on and after the Union's December 9 offer to return is that this offer imposed a plain "condition," that the strikers be returned "to work under the contract that was in effect prior to the strike." To meet this point, the prosecutor's 8(a)(3) theory posits, moreover, the proposition (never alleged in the complaint) that the Respondent was not free to "implement" any terms of its last offer under circumstances where, by virtue of its unlawful surface bargaining, the impasse that was clearly reached was not a good-faith impasse (or, to use the Board's terminology in *Colorado-Ute*, was not a "lawful impasse"). And it is on the basis of these dual premises, finally, that the General Counsel feels free to characterize the Union's eventual offer to return as an "unconditional" one, despite its plainly "conditional" features, for he reasons that the Union's offer only sought to put the strikers back into the same position they occupied before the Respondent's unlawful implementation of its last offer.

On a different record, the General Counsel's theory of 8(a)(3) violation might be received more sympathetically, despite its resort to exotic definitions of the word "unconditional." But I need not reach that theory, finally, because I have found, in substance, that the impasse reached was a lawful one, and not the product of any alleged design on the Respondent's part to frustrate an agreement and, therefore, the Respondent was free under established principles to implement its last offer, subject only to the arguable exception of its hours-of-work proposal under the narrow exception defined in *Colorado-Ute*. That the Respondent was generally free after arriving at a lawful impasse to implement its last offer dooms the General Counsel's 8(a)(3) theory. For in *McAllister Bros.,* 312 NLRB 1121, 1122 (1993), where the employer lawfully implemented changes consistent with its last offer after lawful impasse, the Board clearly held that "the Union's . . . offer to return to work . . . conditioned on implementation of the terms that existed under the expired agreement" was not an "unconditional offer" and "[a]ccordingly . . . the Respondent did not violate Section 8(a)(3) and (1) when it refused to reinstate the striking employees." Clearly the Union's offer here was similarly conditioned on the Respondent's restoration of old contract terms that the Respondent had no duty to restore, given the lawful impasse that had been reached months earlier. Moreover, under the reasoning of *McAllister Bros.,* it could not make a difference here that the Respondent might not have been free under *Colorado-Ute* to implement the hours-of-work feature of its last offer, for the Union's offer to return was not "conditioned" merely on the Respondent's agreement to withdraw implementation of that feature, but required the Respondent to restore the entire panoply of terms and conditions established by the old contract. Accordingly, any violation that the Respondent might have committed if it had genuinely implemented its hours-of-work proposal could not have operated to convert the Union's more broadly conditional offer into one that gave rise to statutory rights to reinstatement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[56]

ORDER

The complaint is dismissed.

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[56] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."